FILE COPY

FILED
MAR 1 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 400.

CITY OF MARION, ILLINOIS, a Municipal Corporation; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, a Corporation; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation, and RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,

Petitioners,

versus

BEN SNEEDEN, as Receiver of the CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

PETITION FOR REHEARING.

RICHARD MAYER,
H. F. DRIEMEYER,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 400.

CITY OF MARION, ILLINOIS, a Municipal Corporation; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, a Corporation; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation, and RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,

Petitioners,

versus

BEN SNEEDEN, as Receiver of the CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now City of Marion, Illinois, a municipal corporation; Continental Illinois Bank and Trust Company, a corporation; The Fidelity and Casualty Company of New York, a corporation, and Ray C. Carroll, as Treasurer of

the City of Marion, Illinois, petitioners in the above-entitled cause, and present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully show:

I.

It is respectfully submitted that the Court should have held that whether general power exists in national banks to pledge assets to secure deposits or not, that is, whether the power extends to the case of private deposits or not, the repeated provision made by Congress for requiring exercise of the power when public funds were deposited, the very general assumption on the part of State Legislatures of the existence of the power, and the long-continued and, until this case, unchallenged administration of the National Bank Act by the Comptroller of the Currency, had worked a practical interpretation or construction of the act which had become so well settled that it was no longer open to judicial question; provision for the security of public funds by obtaining pledges of assets from national banks in which such funds are deposited has become and is so essential a part of the economy of management and safekeeping of public funds, that neither the safety of public funds now so protected nor the opportunity of such protection in the future should be disturbed except by positive legislative enactment.

II.

We respectfully submit that the Court has incorrectly determined the question of Illinois law involved. Whether the transaction involved in Ward v. Johnson, 95 Ill. 215, was a loan as distinguished from a deposit or not, the fact remains that the Court in that case clearly and unqualifiedly made the statement that Illinois banks have authority to pledge assets to secure deposits. We submit that if any assumption is to be made, it should be assumed that the statement of the Court in Ward v. Johnson has been regarded in Illinois as expressing the law, rather than to assume that because of the fact that the statement has not been questioned in any subsequent Illinois decision, Illinois banks have not pledged assets to secure public deposits, or, if they have done so, such pledges have uniformly been conceded to be invalid without litigation. As this Court has pointed out, courts of other states have referred to Ward v. Johnson as authority for the proposition that banks have the power to pledge assets to secure deposits (Note 4 to Opinion). No reason suggests to your petitioners itself why Ward v. Johnson should have been regarded otherwise in the State of Illinois; the absence of reported litigation seems persuasive, if not conclusive, that in the liquidation of closed state banks in Illinois public deposits secured by pledge of assets have been uniformly accorded the benefit of the security given therefor. The Court says that "no exertion of the alleged power on the

part of any state bank has been shown." Proof of actual instances of the exercise of the power upon the part of an Illinois state bank could not possible be so conclusive of the existence of the power as is the recognition of its existence and utilization by the Legislature.

In deciding the question of Illinois law relative to the powers of state banks, the Court has also overlooked the question of the legislative interpretation of the Illinois statute relating to the powers of banks. The Court has referred to Section 10 of the State Depositary Act (Opinion, Note 3a), but it has not given consideration to the fact that under Section 5 of Article XI of the Illinois Constitution of 1870, no law affecting the corporate powers of banks may become effective without a referendum, and the fact that no provision was made for submitting the State Depositary Act to referendum. It cannot, therefore, be said that the duty imposed upon the State Treasurer by the State Depositary Act to demand pledges authorizes Illinois state banks to make them. If the decision in this case be adhered to, then the result is that all pledges made by banks in Illinois, whether state or national, to secure deposits of state funds are illegal and void. This result should not be reached. The safety of the public funds of the state should not be imperiled. It seems more reasonable to conclude that the Illinois State Depositary Act is a recognition by the Legislature of the existence of general power in Illinois banks to pledge assets as security for public funds and provision for specific utilization of that

power for the protection of state funds. If the general power in Illinois banks to pledge assets to secure public deposits exists, then, of course, a pledge made to secure any deposit of public funds is valid, whether the officer making the deposit be specifically required by law to demand the pledge or not.

III.

Respondent should not in any event be permitted to recover the bonds pledged without repaying the money deposited, and the Court, in deciding this case, should have followed the rules laid down in cases such as Citizens Central National Bank v. Appleton, 216 U. S. 196, and Logan County National Bank v. Townsend, 139 U. S. 67.

In those cases the transactions question were ultra vires. There was no identifiable **res** or constructive trust based on special circumstances of misconduct, and yet the Court held that it was the duty of the bank to account for the money which it had received as a result of its ultra vires transactions.

The Receiver in this case is seeking to disaffirm a contract of which the bank and its creditors have had the benefit. If the contract was ultra vires the bank might have set it aside, but it could not have recovered the pledged bonds without repaying the deposits; it could not retain the benefit of the disaffirmed contract. The general rule is that a receiver acquires no greater rights in its

property than the bank had.* In this case, if the pledge be held ultra vires, it was void, and general creditors would have no superior right to that of the bank to which the Receiver would succeed. If void, the bank might recover the pledged bonds, but only on condition of returning the benefit it had from the transaction. There is no statute giving general creditors superior rights in a case like this. If the bank prior to receivership did not exercise its right to disaffirm, then the general creditors represented by the Receiver succeed only to such right as the bank itself had, and the Receiver cannot rescind the contract without making restoration to the extent of the benefit the bank had received. The Receiver's prayer is for equitable relief, and relief should be granted only upon equitable principles.

No question is involved in this case of the good faith of the parties. There is no suggestion of fraud or of an excessive pledge or of the solvency of the bank at the time the pledge was made. The money deposited in the

---

* See Fourth Street Bank v. Yardley, 166 U. S. 634, where the Court said (page 653): "The Receiver took no greater right in the property of the insolvent bank which came into his possession than that which the insolvent bank possessed." Also, Scott v. Armstrong, 146 U. S. 499, 507: "The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached."

Section 52 of the National Bank Act (Act of June 3, 1864, Chap. 106, Sec. 52, 13 Stat. 115, and Act of March 3, 1873, Chap. 269, Sec. 2, 17 Stat. 603; R. S., Sec. 5242; 12 U. S. C. A. 91), which provides: "All transfers * * *; all assignments * * *; * * *, made after the commission of an act of insolvency, or in contemplation thereof, made with the view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, * * *, shall be utterly null and void; * * *."

Burrowes v. Nimocks, 35 Fed. (2d) 152, 158-159.

bank was in the possession of Carroll as City Treasurer; he was an insurer of the funds in his hands and he is himself the one who must ultimately pay out of his own funds whatever loss may occur; The Fidelity Company is only the surety on Carroll's bond. It is obvious that the contract of the parties was entered into with the belief upon the part of all concerned that the contract of pledge was valid and lawful. The Comptroller of the Currency had consistently administered the National Bank Act as granting the power exercised; Ward v. Johnson was the single and unquestioned decision of the Illinois courts; the Illinois Legislature had assumed the existence of power not only in state banks, but in national banks, to pledge assets to secure deposits of public funds. The deposits which the bank received by reason of the pledge were applied to the bank's business and the bank and its creditors had and received the benefit of the money due to the agreement which the bank made and the bonds which it delivered as security. To permit the Receiver to recover the bonds pledged and to remit the City of Marion to the status of a general creditor would give the other general creditors of the bank an advantage to which they are not justly entitled. The effect of the pledge of the securities was substantially the same as a sale, and if the Receiver should be permitted to recover the bonds pledged without paying the amount of the City's deposit, the general creditors would, in effect, have the benefit not only of the things sold, but of

the proceeds of the sale. Such a result should not be reached in the absence of a positive statute compelling it.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, reversed.

Respectfully submitted,

RICHARD MAYER,
H. F. DRIEMEYER,
Counsel for Petitioners.

Certificate of Counsel.

We, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

Richard Mayer,
H. F. Driemeyer,
Counsel for Petitioners.